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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

NO. [redacted]49

In re Cosmopolitan Power Company, bankrupt.

THE STATE OF NEW JERSEY, *Appellant,*

vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION OF APPELLEE TO DISMISS THE APPEAL AND BRIEF IN SUPPORT THEREOF

FREDERICK D. SILBER,
Counsel for Appellee.

CHAMPLIN LAW PRINTING CO.

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NO. 302.

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THE STATE OF NEW JERSEY, *Appellant,*

vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION TO DISMISS APPEAL.

Comes now William F. Anderson, as trustee in bankruptcy of Cosmopolitan Power Company, bankrupt, appellee, and moves this Honorable court to dismiss the appeal herein, for the reason that the determination of the question, involved in the rejection of appellant's claim to priority of payment, is not essential to a uniform construction of the Bankruptcy Act throughout the United States, and that therefore this Honorable Court has no jurisdiction of the subject-matter of said appeal.

Wherefore appellee prays that the appeal may be dismissed.

FREDERICK D. SILBER,
Counsel for Appellee.

NOTICE.

To the appellant, and to its counsel, Mr. Levy Mayer, Mr. Robert H. McCarter and Mr. T. A. Moran:

You are hereby notified that the appellee, William F. Anderson, trustee of Cosmopolitan Power Company, bankrupt, will, on the 13th day of November, A. D. 1905, on the convening of the United States Supreme Court on that day, or as soon thereafter as counsel can be heard, submit to said court his motion that the appeal by the State of New Jersey, from the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, be dismissed, as appears by the foregoing motion, and will submit the attached brief in support of said motion.

Yours respectfully,

FREDERICK D. SILBER,
Counsel for Appellee.

Service of copies of the said motion and brief are admitted this —— day of October, A. D. 1905, at Chicago, Illinois.

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Counsel for Appellant.

STATEMENT OF THE CASE.

The Cosmopolitan Power Company, a corporation, was duly adjudicated a bankrupt by the District Court of the United States for the Northern District of Illinois. Thereafter, in said bankruptcy proceedings, the State of New Jersey filed its proof of claim (Rec., pp. 12 and 13) for $9,254.90, setting forth that said amount represented "franchise taxes" demanded by the said state from the bankrupt for the years 1902 and 1903, in the following items:

Tax, 1902	$5,750.00
Interest to October 15, 1903	891.25
Costs on injunction proceedings because of non-payment of taxes	26.15
Tax for 1903	2,500.00
Interest to October 15, 1903	87.50
Total	$9,254.90

Subsequently, appellant filed a petition before the referee in bankruptcy praying that said claim be given priority of payment under section 64 A, of the Act of Bankruptcy.

To the claim of appellant, as filed, objections were filed by appellee (Rec., p. 2), denying, *first*, that appellant was entitled to the amount claimed, and, *second*, that appellant was entitled to any priority of payment. Upon the hearing of said objections, the referee reduced the claim for the year 1902 from $5,750 to $4,250, and disallowed the entire claim for the year 1903, allowing appellant's claim in the total sum of $4,943.08, *as a general*, and not as a preferred, claim.

The ground of this ruling was that the claim *was not a tax*, and in arriving at this conclusion the referee followed the latest decision of the Court of Errors and Appeals of

New Jersey, *in re U. S. Car Co., 60 N. J. Eq., 514* (Rec., pp. 3-8).

Thereafter, appellant obtained a review of said ruling by the District Court for the Northern District of Illinois, where the order of the referee was affirmed (Rec., p. 26). From the order of the District Court appellant prayed and obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit. In that court appellant contended that it was entitled to the allowance of the full amount claimed in its proof of claim, and that said amount should be paid in full, *on the ground that the claim was a tax*, and that it had been so held by the Court of Errors and Appeals of New Jersey, *in re Hancock* vs. *Singer Mfg. Co., 62 N. J. Law*, 289. Appellant contended that the *Singer* case, although decided earlier than the *U. S. Car Co.* case, was controlling, but this contention was denied by the judgment of the United States Circuit Court of Appeals for the Seventh Circuit (Rec., pp. 36 to 41). That court, however, directed the court below to increase the total amount of appellant's claim, by allowing the "franchise tax" claimed for the year 1903, as a general claim (Rec., p. 42). The reason for such direction was that when the petition in bankruptcy was filed against the Cosmopolitan Power Company, the franchise taxes for the year 1903 were potentially in existence as a debt, and therefore that amount could be said to be due at the time the petition in bankruptcy was filed.

Subsequently his Honor, Justice DAY, allowed appellant an appeal to this court (Rec., p. 42), and signed a certificate reciting that in his opinion the determination of the questions involved was essential to the uniform construction of the Bankruptcy Act throughout the United States.

BRIEF OF ARGUMENT.

THE COURT IS WITHOUT JURISDICTION OF THIS APPEAL BECAUSE THE DETERMINATION OF THE QUESTION INVOLVED IS NOT *essential* TO A UNIFORM CONSTRUCTION OF THE BANKRUPTCY ACT THROUGHOUT THE UNITED STATES.

The appeal at bar was taken under section 25, clause 2, of the Bankruptcy Act, which provides that an appeal may be had from a final decision of a Court of Appeals, allowing or rejecting a claim, where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim, *is essential to a uniform construction of the Bankruptcy Act throughout the United States.*

It will be seen that the jurisdiction of this court over such an appeal depends upon two propositions: *(a)* that the appeal involves the allowance or rejection of a claim under the act; *(b)* that the determination of the question involved in the allowance or rejection of such claim *is essential* to a uniform construction of the Bankruptcy Act throughout the United States.

Appellant claims to be entitled to priority of payment under section 64, A of the Bankruptcy Act, which provides as follows:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality, in advance of the payment of dividends to creditors."

Appellee maintains that the only question, shown by appellant's petition for appeal and by the record, is whether or not the franchise tax of New Jersey, in question *is or is not*

a tax, and that the determination of that question is not essential to, and is not included in, the uniform construction of any part or portion of the Bankruptcy Act.

ARGUMENT.

Appellant contended before the referee, the District Court and the Court of Appeals, that the charge in question *was a tax,* and based such contention upon the statutes of New Jersey, and upon the decisions of the Court of Errors and Appeals of New Jersey, notably upon the case of *Hancock* vs. *Singer Mfg. Co.,* 62 N. J. Law, 289, decided November 14, 1898.

Appellant further contended that because the charge in question had been held to be a "tax" in the *Singer* case, that it was obligatory upon the court below to follow that decision, and allow priority to the claim. Appellee maintained in all of the courts below that the charge in question *was not a tax,* but was a contract obligation, and that it had been held to be not a tax by the Court of Errors and Appeals of New Jersey, *in re U. S. Car Co.,* 60 *N. J. Eq.,* 514, *decided July* 7, 1899. The referee held that the *U. S. Car Co.* case was controlling and, following the same, held the charge to be not a tax, and not entitled to priority of payment. He also held that the obligation was founded on contract (Rec., pp. 5, 6). The District Court, in affirming the referee, held to the same effect.

The Circuit Court of Appeals for the Seventh Circuit declared that the Court of Errors and Appeals of New Jersey had decided the nature of the obligation *in re U. S. Car Co.,* 60 N. J. Eq., 514, holding that the claim in question *was not*

a tax, and the court therefore followed the last decision of the highest court of said state (Rec., pp. 39, 40).

The pertinent query now arises, is it essential to the uniform construction of the Bankruptcy Act throughout the Union that this Honorable Court should determine which of the decisions of the Court of Errors and Appeals of New Jersey should control, whether the *Singer* case, or the *U. S. Car Co.* case? Is it essential to the uniform construction of the Bankruptcy Act throughout the Union that this Honorable Court decide on the present appeal, for the benefit of the executive department of the State of New Jersey, whether the judicial department meant to hold that the charge in question was or was not a tax? It is perfectly apparent that the purpose of this appeal is to obtain a decision from this Court to the effect that the so-called franchise tax of New Jersey upon the capital stock of corporations, *is in reality a tax*, so that the state may not longer suffer from the decision of its own highest court, *holding the charge to be no tax*. With such a purpose fairly shown on the record, we submit that the court should refuse to take jurisdiction of the appeal.

If counsel contend that the purpose of the appeal is to obtain uniformity in the decisions of the Bankruptcy Courts relating to the allowance of tax claims, that position is completely answered by the statement that *there is now absolute uniformity* on that question among the various Courts of Bankruptcy. The learned counsel for appellant have cited in their petition four cases in bankruptcy upon this question, and we shall discuss them in their order and show that the decision in each case rested upon exactly the same ground.

In re Ott, 2 A. B. R., 637, decided by the District Court for the Southern District of Iowa, July 5, 1899, the "mulct tax" of Iowa was in question. The county had filed such a

claim against the bankrupt and it was resisted on the ground that the claim was not a tax. The decisions of the highest court of Iowa were looked to, and the court said that if a construction of the statute in question had been directly and positively given, such construction would be accorded careful and weighty consideration; whether it would absolutely control was not decided by the court. But it was found that the Supreme Court of Iowa had directly decided that the "mulct tax" *was not a tax,* and hence the District Court refused to allow any priority to the claim. It will thus be seen that in the Ott case the court followed the decision of the Supreme Court of the state in construing the nature of the charge.

In re Mutual Mercantile Agency, 8 A. B. R., 435, the State of New Jersey claimed priority upon the same tax, called in question at bar. The referee followed the *Singer* case, but without apparently knowing of the decision in the *U. S. Car Co.* case, as the latter case is not even cited or mentioned in the opinion. However, the court followed what it believed to be the law of the state.

In re Danville Rolling Mill Co., 10 A. B. R., 327, Judge McPherson, of the District Court of Pennsylvania, denied the right of the State of New Jersey to priority upon a similar claim, following the Court of Errors and Appeals of New Jersey, as decided *in re U. S. Car Co.,* 60 N. J. Eq., 514. In his decision the court does not mention or refer to the *Singer* case, but follows what appears to be the law of New Jersey.

In re Emmerman vs. *Ohio Steel and Iron Co.,* 13 A. B. R., 40, decided by Referee Doyle, of the Northern District of Ohio, the laws of Ohio were construed with reference to the validity of a similar charge as a tax, and, after stating that the Bankruptcy Court would follow the decisions of the highest court of the state, the opinion proceeds:

> "But on the other hand, by whatever name the charge may be designated, even though it be called a tax, if the court of the state in which the question arises declares that the same is not a tax, then, and in that case, the Bankruptcy Court would not allow the same to be allowed as a tax; nor would it require the trustee to pay the same as a claim entitled to priority."

The referee, after considering the Ohio decisions, found that they held the charge in question to be a tax, and held that he would allow it priority unless it appeared that the bankrupt did not legally owe the same. On consideration of the latter question the court concluded that nothing was due the claimant at the time the petition in bankruptcy was filed, and hence that nothing could be allowed to the State of Ohio upon its claim. But, under the reasoning of the opinion, the court allowed as a priority whatever was due to the state, when the petition was filed, *because the Supreme Court of Ohio had held the charge to be a tax.*

It follows logically, from a consideration of the foregoing cases, being all of those cited by appellant, *that there is absolute uniformity* in the holdings of the various courts in respect to the allowance of claims based upon taxes; that all of the Bankruptcy Courts have followed the highest court of the state under whose laws the claim is made. *The only question upon which there has not been uniformity in the decisions is, whether or not the decisions of the highest court of New Jersey construe the charge in question to be a tax, the Mutual Mercantile Agency case holding it to be a tax, and the Danville Rolling Mill Co. case holding the opposite.* There is, therefore, absolutely nothing in the decision of the case at bar which is essential to a uniform construction of the Bankruptcy Act, but on the contrary, the only thing to be gained by a consideration of the case at bar, by this Honorable court, will be to settle for the benefit of the

State of New Jersey the mooted question of what its highest court considers to be the nature of the so-called franchise tax. We maintain that that is a question of interest solely to appellant and in no wise to the various Courts of Bankruptcy. If the State of New Jersey itself is unable to say whether the charge in question is or is not a tax, the various Courts of Bankruptcy will decide whether to allow New Jersey priority upon such claims, upon a consideration of the soundness of the respective conflicting decisions. We submit that no question of the construction of the Bankruptcy Act can be involved in such a consideration. The act requires the court to order the trustee to pay certain taxes. When a claim is made under this section, the courts have uniformly inquired whether the claim was based upon a tax and if they found that it was, they have uniformly ordered that the same be paid in full. There is a great difference, however, between determining whether or not the claim is a tax and determining which of the conflicting decisions made by the highest court of the state should control. It is clear that if the highest court of the state has not spoken on the subject, or if it has spoken inconsistently or without finally settling the matter, the Court of Bankruptcy would be under the duty of construing for itself the nature of the claim, and of deciding for itself whether it was or was not a tax. If it came to an erroneous conclusion in such a consideration, there would be no question of the construction of the Bankruptcy Act involved. It would be merely a question of the construction of the laws and decisions of the particular state interested.

For example, in the *Ott* case, *supra,* the statutes and decisions of Iowa in reference to the "mulct tax" were construed and the court found that while the statutes indicated an intention to make the charge a tax, the decisions of the Supreme Court of Iowa held that it was not a tax, and con-

sequently denied the claim any priority. While in the case of *Emmerman* vs. *Ohio Steel and Iron Co., supra,* the court found that the Supreme Court of Ohio had held the claim in question to be a tax, and would have allowed the claim priority excepting for the fact that nothing was due to the State of Ohio from the bankrupt on the day the petition in bankruptcy was filed. It is clear that there will always be lack of uniformity in the conclusions of the Bankruptcy Courts of the various districts, arising from differences in the statutes of the various states and in the decisions of their highest courts upon the particular tax claim asserted. *But this lack of uniformity and these differences are not based upon any different theory of construction of any part of the Bankruptcy Act, and can not furnish any basis for an appeal to this court.*

Appellant has referred to the language of the Court of Appeals where it said (Rec., p. 40):

> "If the legislature of the state gives the name tax to an exaction which is not a tax, and if the courts of that state join in the misnomer, surely the Bankruptcy Courts are not required to disregard the substance of the thing, to the detriment of other claimants. The state courts may authoritatively expound the substance and the Federal Courts will adopt such exposition; but whether the substance constitutes a tax or not is independent of the name."

Appellant has sought from this language to draw the conclusion that the court, in construing the nature of the claim, decided that it was not bound by the decisions of the highest court of the state. We submit that the language in question will not bear that construction. But even if it did, there would still be no question involved, *essential* to the uniform construction of the Bankruptcy Act. There is nothing in the Bankruptcy Act which prescribes the duty of a court to follow or not to follow the decisions of the

highest court of the particular state, in construing questions arising on claims made by such state, and therefore that argument of counsel for appellant does not become of any force on the question of jurisdiction.

It was also said in the petition for appeal, that the former decisions of this Honorable court should be followed in respect to franchise taxes, even if the decisions of New Jersey were not followed, by the court below. It is a sufficient answer to that contention to say that all of the lower courts followed the opinion of the highest court of New Jersey, in the case at bar. But if they had not, the cases cited in appellant's petition are not in point, because the franchise tax in question in those cases was in its nature *an entirely different exaction* from that in the case at bar, and the language used in those decisions would not, in our opinion, shed any light upon the nature of the charge in the case at bar.

It can not be argued that the allowance of the appeal on the certificate of his Honor, Mr. Justice DAY, was final, so as to preclude the court from a consideration of the jurisdictional question. The preliminary allowance of the appeal upon the certificate, under section 25, is no different than the preliminary allowance of an appeal in any other case by a Justice of this court, and, as we understand the practice, the court determines for itself whether it has jurisdiction, upon a motion properly made.

As was said in *Callan* vs. *May*, 2 Black., 541, by Mr. Chief Justice TANEY, on a motion to dismiss the appeal:

> "It seems to be supposed by counsel in the argument that an order of the judge of this court, allowing the appeal, was conclusive and that its validity was not now open to dispute. But the *allocatur* of a judge was never so considered. Writs of error to state court can not issue without the *allocatur* of a judge of this

court. Yet there is hardly a term in which a case of that description has not been dismissed upon the ground that the transcript did not show a case in which a writ of error would lie. A contrary doctrine would be exceedingly inconvenient if it could be maintained, and would throw upon a single judge the responsibility which properly belongs to the court. And it does not by any means follow that the judge who authorizes the appeal has made up his own mind that the party is legally entitled to it. He may, and no doubt often does, entertain doubts upon the subject, and may regard the point as new and undecided, and upon which different opinions may be entertained, and in such cases he grants the appeal in order to bring the matter before the court and enable it to decide for itself whether the case is not within their appellate jurisdiction as regulated by the act of Congress. The *allocatur* of a single judge certainly can not enlarge the appellate powers of this court beyond the limits prescribed by law, and that law does not authorize an appeal from an order directing execution to issue to enforce a judgment. The appeal is dismissed."

In conclusion we submit that the record at bar fails to disclose any section of the Bankruptcy Act whose construction is essential to the uniform construction of the act throughout the United States. That being the case, it leaves this Honorable Court without jurisdiction to entertain the appeal. We can see that it is highly desirable, from the standpoint of the State of New Jersey, that the *Singer* case, which counsel claim construed the charge in question to be a tax, should be upheld by the decision of this court, because, in view of the great number of bankrupt New Jersey corporations, the state will lose large sums if the Bankruptcy Courts do not construe the charge in question to be a tax; but surely that furnishes no reason why this Honorable Court should take jurisdiction of the present appeal.

Again, counsel in their petition for appeal (p. 12) show THAT ALL OF THE REVENUE OF THE STATE OF NEW JERSEY

IS DERIVED FROM THE IMPOSITION OF THE FRANCHISE TAX, WITH THE EXCEPTION OF A SMALL SCHOOL TAX. That may furnish a reason for the importance of the present appeal to the State of New Jersey, but it scarcely furnishes an argument which would tend to influence this Court to entertain jurisdiction of the appeal.

The estate of the Cosmopolitan Power Company, the bankrupt, has been reduced to cash, ready for distribution, for more than two years. Its proven liabilities exceed $200,000, while its total assets are about $16,000. The petition in bankruptcy was filed April 23, 1903. No dividends have ever been declared by reason of the fact that appellant's claim for priority, if allowed, would absorb about two-thirds of the entire estate. If this Honorable Court determines that it is without jurisdiction of the appeal nothing will stand in the way of an immediate distribution of the estate, and if such a conclusion should be reached, it would be to the great advantage of a large body of creditors that it be announced as early as possible. Believing that there is no theory upon which the present litigation can continue any longer, we earnestly urge that the appeal be dismissed.

Respectfully submitted,

FREDERICK D. SILBER,
Counsel for Appellee.